

## **Special Rule Cancellation under INA § 240A(b)(2)**

INA § 240A(b)(2) provides that an alien who is inadmissible or deportable from the United States is eligible for cancellation of removal and adjustment of status to that of a lawful permanent resident if he or she: (1) has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen or lawful permanent resident, or has a child who was subjected to such abuse; (2) has been physically present in the United States for a period of not less than three years immediately preceding the date of such application; (3) has been a person of good moral character during such period;<sup>1</sup> (4) is not inadmissible under paragraph (2) or (3) of INA § 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of INA § 237(a), unless a domestic violence waiver is granted, and has not been convicted of an aggravated felony; and (5) establishes that removal would result in extreme hardship to the alien, the alien's child, or the alien's parent. If statutory eligibility is established, special rule cancellation may be granted in the exercise of discretion. INA § 240A(b)(2); Rosario v. Holder, 627 F.3d 58, 61 (2d Cir. 2010).

Notwithstanding the heading of INA § 240A(b), which only refers to nonpermanent residents, a lawful permanent resident who qualifies as a battered spouse is not prohibited from applying for cancellation of removal under INA § 240A(b). Matter of A-M-, 25 I&N Dec. 66, 76 (BIA 2009).

### **A. Battery or Extreme Cruelty**

The INA does not define battery or extreme cruelty in relation to special rule cancellation of removal, but the regulations define these terms in the context of adjustment of status for VAWA self-petitioners. See 8 C.F.R. § 204.2(c)(1)(vi). In that context, battery or extreme cruelty “includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.” 8 C.F.R. § 204.2(c)(1)(vi). “Psychological or sexual abuse or exploitation...shall be considered acts of violence.” 8 C.F.R. § 204.2(c)(1)(vi). Furthermore, “[o]ther abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.” 8 C.F.R. § 204.2(c)(1)(vi). Evidence of abuse may include “reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Other forms of credible relevant evidence will also be considered.” 8 C.F.R. § 204.2(c)(2)(iv).

### **B. Continuous Physical Presence**

A departure from the United States for a period in excess of 90 days, or 180 days in the aggregate, cuts short the applicant's period of continuous physical presence. INA § 240A(d)(2).

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<sup>1</sup> In *Matter of M-L-M-A-*, 26 I&N Dec. 360 (BIA 2014), the BIA followed *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), and *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), and held that because an application for special rule cancellation of removal under INA § 240A(b)(2) is a continuing one, false testimony given by the respondent more than three years prior to the entry of a final administrative order should not be considered in determining whether she is barred from establishing good moral character under INA § 101(f)(6).

No absence or portion of an absence related to the battering or extreme cruelty perpetrated against the alien shall count toward the 90-day or 180-day limits. INA § 240A(b)(2)(B). For special rule cancellation of removal, issuance of a charging document does not toll the period of continuous physical presence in the United States. INA § 240A(b)(2)(A)(ii). However, continuous physical presence is deemed to end “when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4).” INA § 240A(d)(1).

### **C. Good Moral Character**

To be eligible for special rule cancellation, an applicant has to be a person of good moral character for three years prior to the continuing application. INA § 240A(b)(2)(A)(ii). An applicant cannot be found to have good moral character if they have been convicted of a crime involving moral turpitude (“CIMT”) within the required period, unless it is determined that the conviction is connected to the applicant being battered or subjected to extreme cruelty. INA § 101 (f)(3); § 240A(b)(2)(C).

### **D. Disqualifying Convictions**

An applicant for special rule cancellation of removal must demonstrate that he is not inadmissible under paragraph (2) or (3) of INA § 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of INA § 237(a), unless a domestic violence waiver is granted, and has not been convicted of an aggravated felony. INA § 240A(b)(2)(A)(iv). An applicant cannot utilize a waiver of inadmissibility under INA § 212(h) to overcome the bar to special rule cancellation resulting from his inadmissibility under INA § 212(a)(2). Matter of Y-N-P-, 26 I&N Dec. 10 (BIA 2012). If an applicant who has not been admitted to the United States commits an offense that does not render him inadmissible but would render an admitted alien deportable, he is not barred from cancellation of removal because he is not “deportable.” Cf. Reyes v. Holder, 714 F.3d 731, 737-39 (2d Cir. 2013) (construing criminal bars to special rule cancellation of removal under NACARA, which are worded identically to criminal bars to special rule cancellation of removal under INA § 240A(b)(2)).

An alien who would otherwise be ineligible for special rule cancellation due to deportability under INA § 237(a)(2)(E)(i) or (ii) may be granted a domestic violence waiver under INA § 240A(b)(5). That waiver is contained in INA § 237(a)(7), which states that certain crimes of domestic violence and stalking may be waived in the case of :

an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship... upon a determination that (I) the alien was acting [in] self-defense; (II) the alien was found to have violated a protection order intended to protect the alien; or (III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime...that did not result in serious bodily injury; and...where there was a connection between the crime and the alien’s having been battered or subjected to extreme cruelty.

INA § 237(a)(7).

### **E. Extreme Hardship**

To establish “extreme hardship,” an applicant for special rule cancellation of removal must demonstrate that his removal from the United States would result in “a degree of hardship beyond that typically associated with deportation.” 8 C.F.R. §§ 1240.20(c), 1240.58(b); see also Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1994). The “elements required to establish extreme hardship are dependent upon the facts and circumstance peculiar to each case,” and they must be considered in the aggregate. O-J-O-, 21 I&N Dec. at 383 (citing Matter of Ige, 20 I&N Dec. 880, 882 (BIA 1994)). Hardships typically associated with deportation, such as economic detriment due to the loss of a job or adjusting to life in one’s native country, are not sufficient to constitute extreme hardship, but they are considered in the assessment of aggregate hardship. O-J-O-, 21 I&N Dec. at 383; see also Matter of Pilch, 21 I&N Dec. 627, 631 (BIA 1996) (“[T]he mere loss of current employment, the inability to maintain one’s present standard of living or to pursue a chosen profession, separation from a family member, or cultural readjustment do not constitute extreme hardship.”).

In making a determination as to extreme hardship, the Court should consider the age of the applicant, both at the time of entry and at the time of his application for relief, his family ties in the United States and abroad, his length of residence in the United States, his own health, as well as that of his qualifying relatives, political and economic conditions in the country of removal, the financial impact of departure from the United States, the possibility of other means of adjustment of status in the United States, his involvement and position in his local community, and his immigration history. Matter of Anderson, 16 I&N Dec. 596, 597 (BIA 1978). Other factors may include the applicant’s ability to obtain employment in his native country; the impact of a disruption in his education; and the psychological impact of removal. 8 C.F.R. § 1240.58(a). Evidence of extreme hardship may include “affidavits, birth certificates of children, medical reports, protection orders and other court documents, police reports, and other relevant credible evidence.” 8 C.F.R. § 204.2(c)(2)(vi).

Furthermore, for special rule cancellation of removal, the Court must consider in its assessment of hardship: the nature and extent of the physical or psychological consequences of abuse; the impact of loss of access to the United States courts, criminal justice system, and supportive services for victims of domestic violence; the likelihood that the batterer or others acting on her behalf would harm the applicant in his home country; the ability and willingness of authorities in the home country to protect the applicant; and the existence of any laws or social practices in the home country that punish the applicant because he has been a victim of domestic violence. 8 C.F.R. 1240.58(c). The Court may consider these factors either in addition to or in lieu of the usual hardship factors. 8 C.F.R. 1240.58(c).

### **F. Discretionary Considerations**

Where an applicant is seeking relief as the battered spouse of a United States citizen or lawful permanent resident, factors related to the nature and purpose of the relief he is seeking are relevant to a discretionary determination as to whether to grant relief. Matter of A-M-, 25 I&N Dec. 66, 77-78 (BIA 2009). The purpose of the battered spouse provisions of the INA “is to enable aliens to leave their abusive citizen or lawful permanent resident spouses who may use the threat of deportation or sponsorship for an immigration benefit to maintain control over them.” A-M-, 25 I&N Dec. at 77. Therefore, factors such as divorce from the abusive spouse, remarriage, and any prior immigration relief granted on account of the abuse may be dispositive. A-M-, 25 I&N Dec. at 78.<sup>2</sup>

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<sup>2</sup> In *Matter of M-L-M-A-*, 26 I&N Dec. 360, 364 (BIA 2014), the BIA found *Matter of A-M-* to be distinguishable from the respondent’s case. Although the respondent in *M-L-M-A-* was divorced from her abusive husband and subsequently had a long term relationship with another man, because she had not previously been granted special rule cancellation of removal based on her abusive marriage and had significant equities, she merited a favorable exercise of discretion. *M-L-M-A-*, 26 I&N Dec. at 364.